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20 LLC; and CFalls Investment, LLC

21 **UNITED STATES BANKRUPTCY COURT**
22 **FOR THE DISTRICT OF OREGON**

23 In re:

24 Summit Accommodators, Inc., dba Summit
25 1031 Exchange

26 Debtor.

Case No. 08-37031 rld11

Adv. Proc. No. 09-3086-rld

27 Kevin D. Padrick, Chapter 11 Trustee,

28 Plaintiff,

v.

Mark A. Neuman; Brian Stevens; Lane D. Lyons;
and Timothy Larkin,

Defendants.

**OPPOSITION TO TRUSTEE'S MOTION
SEEKING EXPEDITED HEARING ON
MOTION FOR SUMMARY JUDGMENT**

DATE: April 30, 2009

TIME: 10:00 a.m.

PLACE: Courtroom 3

1 Klondike Point, LLC, an Oregon limited liability company; Stone Mountain, LLC, an
2 Oregon limited liability company; CFalls Investment, LLC, an Oregon limited liability company; and
3 Corney Investors, LLC, an Oregon limited liability company (collectively, the “LLCs”), hereby
4 submit the following Opposition to the Motion for Expedited Hearing (“Motion to Expedite”)
5 relating to that Motion for Summary Judgment (“Summary Judgment Motion”) filed by Kevin D.
6 Padrick, Chapter 11 trustee (“Trustee”) for Summit Accommodators, Inc., dba Summit 1031
7 Exchange (“Debtor”).

8 **I.**

9 **PRELIMINARY STATEMENT**

10 By the Summary Judgment Motion, the Trustee seeks from this Court an order authorizing
11 the Trustee to seize non-estate property from about fifty limited liability companies (“Target
12 Entities”) that are neither debtors before this Court, nor defendants in this adversary proceeding. As
13 explained more fully herein, this relief is outside the jurisdictional reach of this Court, and the
14 procedural means by which the Trustee is seeking this relief would deny the LLCs and the other
15 Target Entities procedural due process. Moreover, the Trustee has submitted to this Court **no**
16 evidence that would justify any expedited consideration of the relief -- procedurally and
17 substantively improper relief -- sought by the Trustee.¹ Accordingly, the Motion to Expedite should
18 be denied.

19 **II.**

20 **SUMMARY OF MATERIAL FACTS**

21 **A) The Complaint.** The Trustee has filed in this case a complaint (“Complaint”)
22 against Mark A. Neuman, Brian Stevens, Lane D. Lyon, and Timothy Larkin, persons that the
23 Trustee alleges are the shareholders of the Debtor (collectively, “Shareholders”). By the Complaint,
24 the Trustee alleges the following claims:

25 _____
26 ¹ As demonstrated herein, if the Trustee intends to impair the rights of the LLCs and their members, he must name
27 them as parties, properly plead the claims that he seeks to enforce against them, and serve these parties in accordance
28 with the requirements of the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules. The Trustee’s
seeking from this Court the equivalent of a mandatory injunction without satisfying these predicates is not a remedy
available to the Trustee.

1 1. First Claim for Relief - Breach of Fiduciary Duty (Against Creditors). By this claim,
2 the Trustee contends that the Shareholders breached the fiduciary duty that they owed to the
3 Debtor's creditors by the Shareholders' using corporate funds derived from the creditors'
4 exchange accounts to fund a series of investment ventures held in the Shareholders' own
5 names;

6 2. Second Claim for Relief - Breach of Fiduciary Duty (Against the Debtor). By this
7 claim, the Trustee contends that the foregoing course of conduct by the Shareholders also
8 breached the Shareholders' duty to the Debtor;

9 3. Third Claim for Relief - Conversion. By this claim, the Trustee contends that the
10 foregoing course of conduct by the Shareholders effectuated a conversion of corporate
11 assets;

12 4. Fourth Claim for Relief – Professional Negligence. By this claim, the Trustee
13 contends that the foregoing course of conduct by the Shareholders gives rise to a claim of
14 negligence against them;

15 5. Fifth Claim for Relief - Civil Conspiracy/Aiding and Abetting. By this claim, the
16 Trustee contends that the foregoing course of conduct by the Shareholders was pursuant to,
17 and in furtherance of, a common conspiracy among the Shareholders;

18 6. Sixth Claim For Relief – Implied-in-Law Contract with Creditors. By this claim, the
19 Trustee contends that the Shareholders' use of creditors' funds for the Shareholders' own
20 purposes creates an implied-in-law contract with the creditors pursuant to which the
21 Shareholders are contractually obligated to repay the funds to the creditors;

22 7. Seventh Claim for Relief – Implied-in-Law-Contract with the Debtor. By this claim,
23 the Trustee contends that the Shareholders' use of the creditors' funds for the Shareholders'
24 own purposes creates an implied-in-law contract with the Debtor pursuant to which the
25 Shareholders are contractually obligated to repay the funds to the Debtor; and

26 8. Eighth Claim for Relief – Constructive Trust/Accounting. By this claim, the Trustee
27 contends that the estate is entitled to the imposition of a constructive trust over all funds
28 taken by the Shareholders (and over all of the Shareholders' other personal assets), and an
accounting.

By the Complaint, then, the Trustee is suing only the Shareholders. **The LLCs are not
named as defendants in the Complaint. Also, by the Complaint, the Trustee does not plead,
or seek, injunctive relief against the LLCs.**

B) The LLCs. Each of the LLCs is an Oregon limited liability company. The LLCs
have different members and the LLCs have different real property assets. None of the Shareholders
is serving as the managing member of any of the LLCs.

1 **C) The Summary Judgment Motion.** By the Summary Judgment Motion, the Trustee
2 is seeking from this Court an order authorizing him to seize and to exercise control over the
3 approximately fifty Target Entities, including each of the LLCs. The Trustee is seeking this relief
4 notwithstanding the fact that the Debtor owns **no** interest in any of these entities.

5 The Trustee’s attempt to seize control over the Target Entities is premised upon the
6 contentions that the Shareholders caused the Debtor to loan funds to Inland Capital, Inc. (“Inland”),
7 an insider-controlled entity, and that Inland purportedly invested funds in the Target Entities.
8 However, the Trustee acknowledges in his declaration filed in support of the Summary Judgment
9 Motion that he has been unable to trace the flow of funds from the Debtor’s estate into the Target
10 Entities. Accordingly, at this juncture, the relief that the Trustee is seeking in this case is premised
11 upon speculation, not fact.

12 **D) The Motion To Expedite.** By the Motion to Expedite, the Trustee is seeking an
13 order setting an expedited hearing on the Summary Judgment Motion. The sole “evidence”
14 submitted in support of the Motion to Expedite is the following conclusory statement made by the
15 Trustee:

16 The Trustee seeks an expedited hearing on this motion because it is critical that the
17 Trustee obtain control of all property of the estate as soon as possible. Many of the
18 assets that are the subject of the turnover claim are losing significant value as time
19 passes, such that any further delay could reduce the recovery to the Debtor's
20 creditors. It also important for the Trustee to obtain a judgment against the
Shareholders to allow execution on any assets that may be outside the scope of the
Trustee's turnover rights.

21 (P. 2, ¶ 5, Motion to Expedite). The Trustee does not identify the assets that are allegedly at risk,
22 or explain why they are at risk. He alleges simply that a body of unnamed assets is “losing
23 significant value” and demands an expedited hearing on account thereof. This conclusory statement
24 provides **no** evidence justifying the issuance of the relief sought by the Trustee.

1 III.

2 **THE TRUSTEE HAS NOT ESTABLISHED**

3 **ANY BASIS FOR EXPEDITED RELIEF**

4 The Trustee's attempt to expedite the hearing on the Summary Judgment Motion must be
5 viewed in light of the draconian relief sought therein by the Trustee. By the Summary Judgment
6 Motion, the Trustee is seeking an order imposing a "constructive trust" upon, and effectively
7 compelling turnover of, the assets of the approximately fifty Target Entities, including the LLCs,
8 that are neither debtors before this Court nor even defendants in the adversary proceeding. The
9 Trustee contends that this extraordinary relief should be considered on an expedited basis because a
10 **possibility exists** that some of the Debtor's funds may have been invested in these entities, and a
11 **possibility exists** that the assets owned by these entities may be declining in value.

12 Setting aside the jurisdictional, substantive and procedural problems presented by the relief
13 sought by the Summary Judgment Motion, the issue before this Court relative to the Motion to
14 Expedite is as follows: **where is the Trustee's evidence supporting the claimed exigency?**
15 Simply put, the Trustee has submitted to this Court **no** competent evidence in support of any
16 shortening of the time requirements provided by the Federal Rules of Bankruptcy Procedure and the
17 Local Bankruptcy Rules for the setting of a hearing on the Summary Judgment Motion. On the
18 contrary, as set forth hereinabove, the request for expedited relief made pursuant to the Motion to
19 Expedite is based solely upon the Trustee's conclusory allegation that "the assets that are the subject
20 of the turnover claim are losing significant value as time passes, such that any further delay could
21 reduce the recovery to the Debtor's creditors." (P. 2, ¶ 5, Motion to Expedite.) This unsupported
22 allegation is not "evidence" and does not rise to the level of "good cause" justifying relief under
23 Rule 9006 of the Federal Rules of Bankruptcy Procedure. Indeed, given the extraordinary relief that
24 the Trustee seeks pursuant to the Summary Judgment Motion -- relief which the LLCs believe is
25 improper and which would impair substantially the interests of the members of the LLCs -- the
26 LLCs should be afforded all of the time to which they are entitled under the Federal Rules of
27 Bankruptcy Procedure and the Local Bankruptcy Rules so that they can have time sufficient to
28 prepare thorough opposition to such relief.

1 Based upon the foregoing, the Trustee has failed to meet the burden imposed upon him for
2 obtaining expedited relief, and, accordingly, the Motion to Expedite should be denied.

3 **IV.**

4 **THE TRUSTEE IS SEEKING RELIEF THAT IS NOT**
5 **AUTHORIZED UNDER APPLICABLE STATE LAW**

6 The LLCs take no position regarding the merits of the claims that the Trustee asserts against
7 the Shareholders.² The LLCs have no interest in the results of the Trustee’s adversary proceeding
8 against the Shareholders insofar as the Trustee seeks relief solely against the Shareholders or against
9 any economic interests that the Shareholders may have in the LLCs. The problem in this adversary
10 proceeding is that the Trustee is **not** content with obtaining solely the relief to which he is entitled as
11 a matter of law. Rather, as demonstrated hereinbelow, the Trustee is seeking extraordinary relief
12 against the LLCs, relief that is in contravention of applicable law.

13 **The Trustee’s effort to seize and to exercise control over the LLCs, in reliance upon**
14 **his unproven claim against the Shareholders, is directly contrary to Oregon law.**³ If and when
15 the Trustee obtains a judgment against the Shareholders, the Trustee will have recourse only to the
16 Shareholders’ “economic interests” in the LLCs. The Trustee will not become a member in any of
17 the LLCs (unless all other members of an LLC consent), and he will not have any right to participate
18 in governance of the LLCs. See, O.R.S. 63.259 (“Rights of judgment creditor against member. On
19 application to a court of competent jurisdiction by any judgment creditor of a member, the court
20 may charge the membership interest of the member with payment of the unsatisfied amount of the
21 judgment with interest. To the extent so charged, the judgment creditor has only the rights of an
22

23 _____
24 ² The LLCs will note, however, that, as to the first claim for relief (breach of fiduciary duty) and the sixth claim for
25 relief (implied-in-law contract with creditors) alleged by the Trustee pursuant to the Complaint, such claims are held
26 by the allegedly victimized creditors, and not by the Trustee, and, accordingly, the Trustee has no standing to pursue
27 such claims. See, Williams v. California 1st Bank, 859 F.2d 664 (9th Cir. 1988); Caplin v. Marine Midland Grace
Trust Co., 406 U.S. 416, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972); Rochelle v. Marine Midland Grace Trust Co., 535
28 F.2d 523, 527 (9th Cir.1976) (reorganization trustee lacks standing to maintain action on behalf of person or entity
other than debtor corporation).

³ Pursuant to Butner v. United States, 440 U.S. 48 (1979), property rights in a bankruptcy case are determined
according to applicable state law.

1 assignee of the membership interest.”)⁴. The Trustee’s effort to persuade this Court to grant to him
2 greater rights than the Shareholders’ economic interests in the LLCs is directly contrary to well-
3 established law. See, Butner v. United States, 440 U.S. 48 (1979).

4 The LLCs are “innocent” parties in this case. The Trustee has not named the LLCs as
5 defendants in the adversary proceeding, nor does the Trustee even allege that the LLCs have acted
6 inappropriately in any manner. The LLCs should not be “tainted” by any misconduct by third parties
7 who have no control over the LLCs, and should not be subjected to the dragnet that the Trustee is
8 seeking to impose upon the Shareholders’ assets, relief which is procedurally and substantively
9 improper as to the LLCs.

10 **V.**

11 **THE TRUSTEE IS SEEKING TURNOVER WITHOUT HAVING**
12 **ALLEGED THIS CLAIM IN THE COMPLAINT**

13 By the Summary Judgment Motion, the Trustee appears to be seeking an order effectively
14 compelling about fifty non-debtors, who also are not defendants in the adversary proceeding, to
15 “turnover” to the Trustee possession and title to their assets. This relief is improper.

16
17
18 ⁴ Oregon law in this regard is consistent with the law in almost every other jurisdiction. See, Zokaite v. Pittsburgh
19 Irish Pubs, LLC, 962 A.2d 1220, 1224 (2008) (Pennsylvania law) (“As is evident from a plain reading of the Section
20 8924 and the comments thereto, a membership interest in a limited liability company encompasses both economic
21 rights (flow-through of monies and tax consequences) and governance rights (participation in the management of the
22 business). Furthermore, Section 8924 proscribes the transfer of a member's interest unless the non-transferring
23 members approve the transaction. Absent unanimous approval, the member's interest is divided into economic rights
24 (which are transferred) and governance rights (which are not transferred). Subject to a contrary operating agreement,
25 a member can freely transfer only economic rights.”); Bobak Sausage Co. v. Bobak Orland Park, Inc., Slip Copy,
26 2008 WL 4814693, P. 5 (N.D.Ill. 2008); (“The Illinois LLC statute accords with this analysis. Section 30-20 provides
27 the “exclusive remedy” of a judgment creditor of a LLC member seeking to satisfy a judgment via the member's
28 interest. 805 ILCS 180/30-20(e). A court with jurisdiction “may charge the distributional interest of the judgment
debtor to satisfy the judgment.” *Id.* 180/30-20, 301 Ill.Dec. 731, 847 N.E.2d 741(a). The statute defines
“distributional interest” as a member's rights to monetary distributions from the LLC. *Id.* 180/1-5, 301 Ill.Dec. 731,
847 N.E.2d 741. “A charging order constitutes a lien on the judgment debtor's distributional interest.”); Brant v.
Krilich, 835 N.E.2d 582, 592 (Ind.App. 2005) (“Thus, while personal property is subject to execution according to
Indiana Code § 34-55-8-2 (Burns Code Ed. Repl.1998), the interest here is limited by I.C. § 23-18-1-10 to the
economic rights and nothing more. [Footnote omitted.] Through execution Krilich may not receive any of Brant's
rights to participate in management, nor may Krilich inspect the books or records of the LLCs. See, CALLISON, §
4:5 at 59 (stating that judgment creditors obtain no right to participate in management, inspect the books or records,
or to force a sale of the membership interest).”

1 Pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure, turnover from any
2 party, other than a debtor, can be obtained only by an adversary proceeding. F.R.B.P. Rule 7001;
3 Lyons v. Lyons (In re Lyons), 995 F.2d 923, 924 (9th Cir. 1993) (“This Court has previously held
4 that where the relief sought is listed in Bankruptcy Rule 7001, the bankruptcy court cannot grant
5 such relief without an adversary proceeding. ... The bankruptcy court's equitable powers do not
6 allow it to derogate from Rule 7001”); In re Perkins, 902 F.2d 1254, 1258 (7th Cir. 1990); (“Even if
7 the Roukas had established standing, their claim would fail on procedural grounds. A turnover
8 action is an adversary proceeding which must be commenced by a properly filed and served
9 complaint. F.R.B.P. Rule 7001. The Roukas, however, entered the matter by filing a motion. A
10 turnover proceeding commenced by motion rather than by complaint will be dismissed ... and a
11 turnover order entered in an action commenced by motion will be vacated.”). Therefore, a party
12 seeking turnover must file an adversary proceeding pleading therein relief under Section 542, and
13 name as defendants therein the parties from which turnover is sought.

14 In this case, by the Complaint, the Trustee does not allege a Section 542 turnover claim
15 against the defendants named in the Complaint, the Shareholders. Moreover, **no** claims, turnover or
16 otherwise, are asserted against the LLCs because they are **not** named as defendants in the
17 Complaint. Since the LLCs are not even parties in the adversary proceeding, the Trustee cannot, as
18 a matter of law, obtain against them any turnover relief under Section 542.

19 VI.

20 **THE UNDERLYING COMPLAINT DOES NOT REQUEST**

21 **INJUNCTIVE RELIEF AGAINST THIRD PARTIES**

22 The Trustee essentially is requesting that this Court issue a draconian Section 105 injunction
23 against non-parties, where the underlying Complaint does not even request such relief. The LLCs
24 believe strongly that no grounds exist to seek such relief against the LLCs. Nevertheless, to the
25 extent that the Trustee intends to seek such relief, he must amend the Complaint, add the LLCs as
26 defendants, and plead a claim for injunctive relief against them, and then make the showing required
27 to obtain such relief. The Trustee cannot simply incorporate this claim for relief in his Summary
28 Judgment Motion. Procedural due process requires more.

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VII.

**THE TRUSTEE EFFECTIVELY IS SEEKING A MASSIVE
ASSET FREEZE AND TITLE TRANSFER VIA A MANDATORY INJUNCTION**

In this case, the Trustee is essentially seeking an asset freeze that would tie up the rights of about fifty non-parties, before judgment, without proof, and without bond. This relief is not possible under Rule 65 of the Federal Rules of Civil Procedure. In this regard, the United States Supreme Court's decision in Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308 (1999) is directly on point:

The requirement that the creditor obtain a prior judgment is a fundamental protection in debtor-creditor law rendered all the more important in our federal system by the debtor's right to a jury trial on the legal claim. There are other factors which likewise give us pause: The remedy sought here could render Federal Rule of Civil Procedure 64, which authorizes use of state prejudgment remedies, a virtual irrelevance. Why go through the trouble of complying with local attachment and garnishment statutes when this all-purpose prejudgment injunction is available? More importantly, by adding, through judicial fiat, a new and powerful weapon to the creditor's arsenal, the new rule could radically alter the balance between debtors and creditor's rights which has been developed over centuries through many laws-including those relating to bankruptcy, fraudulent conveyances, and preferences. Because any rational creditor would want to protect his investment, such a remedy might induce creditors to engage in a "race to the courthouse" in cases involving insolvent or near-insolvent debtors, which might prove financially fatal to the struggling debtor.

527 U.S. 330-331.

The Supreme Court ruled similarly in De Beers Consol. Mines v. U.S., 325 U.S. 212, 222 (1945):

To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestering his opponent's assets pending recovery and satisfaction of a judgment

1 in such a law action. No relief of this character has been thought justified in the
2 long history of equity jurisprudence.

3 We are of opinion that the injunction issued in this case is not authorized either by
4 statute or by the usages of equity and that the decree granting the injunction should
5 be reversed.

6 325 U.S. at 222-23.

7 See also, Dateline Exports, Inc., v. Basic Construction, Inc., 306 F.3d 912 (9th Cir. 2002)
8 ("In Grupo Mexicano, the Supreme Court held that a district court does not have the authority to
9 issue a preliminary injunction preventing a party from disposing of assets pending adjudication of a
10 claim for money damages. Id. at 333, 119 S.Ct. 1961. The Court noted that "before judgment (or
11 its equivalent) an unsecured creditor has no rights at law or in equity in the property of his debtor.")

12 The grant of injunctive relief is an "extraordinary remedy." Direx Israel, Ltd. v.
13 Breakthrough Medical Corp., 952 F.2d 802, 815 (4th Cir. 1981). The Supreme Court has held that
14 "an injunction should issue only where the intervention of a court of equity 'is essential in order
15 effectually to protect property rights against injuries otherwise irremediable'." Weinberger v.
16 Romero-Barcelo, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). See also, Amoco
17 Production Co. v. Village of Gambell, 480 U.S. 531, 107 S.Ct. 1396, 1402, 94 L.Ed.2d 542 (1987).
18 To obtain injunctive relief, a moving party must "show the present threat of irreparable harm."
19 Direx, at 815.

20 In Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir.2003),
21 the Ninth Circuit formulated the legal standard for granting injunctive relief as follows:

22 The standard for granting a preliminary injunction balances the plaintiff's likelihood
23 of success against the relative hardship to the parties. To obtain a preliminary
24 injunction, a party must demonstrate either: (1) a likelihood of success on the
25 merits and the possibility of irreparable injury; or (2) that serious questions going to
26 the merits were raised and the balance of hardships tips sharply in its favor. . . .
27 These two alternatives represent "extremes of a single continuum," rather than two
28 separate tests. . . . Thus, the greater the relative hardship to [the party seeking the
preliminary injunction,] the less probability of success must be shown.

340 F.3d at 813.

In this case, **no** grounds exist to grant the injunctive relief sought by the Trustee. The Trustee has made no showing to obtain injunctive relief. The Trustee has alleged only that he has a

1 generalized concern that unnamed assets, in which the estate may have an interest, may decline in
2 value, in the near future, for some unspecified reason. A guess coupled with a desire is not evidence,
3 and it will not support the granting of injunctive relief under Section 105 of the Bankruptcy Code or
4 under Rule 65 of the Federal Rules of Civil Procedure.

5 The Trustee, then, has failed to meet his burden for obtaining injunctive relief in this case.
6 Accordingly, this Court should not even consider at this time the Trustee's Motion to Expedite.

7 **VIII.**

8 **CONCLUSION**

9 The Summary Judgment Motion represents an attempt by the Trustee to obtain relief as to
10 the LLCs to which the Trustee is not entitled as a matter of law. The Trustee's Summary
11 Judgment Motion is so fatally defective from a procedural standpoint that this Court should not
12 even consider at this time the Trustee's Motion to Expedite. Moreover, the Trustee's Motion to
13 Expedite is not supported by any competent evidence, and, hence, should be denied as a matter of
14 law. Although the Trustee is entitled to his day in Court, given the extraordinary nature of the
15 relief that he is seeking in this case, the LLCs and the almost fifty-plus other non-parties who may
16 be opposing the Trustee's relief should be accorded more, not less, time to oppose such relief than
17 is allowed under the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules.

18 Respectfully Submitted,

19 DATED: April 29, 2009

20 **WINTHROP COUCHOT**
21 **PROFESSIONAL CORPORATION**

22 By: /s/ Robert E. Opera
23 Robert E. Opera
24 Attorneys for Interested Parties Klondike
25 Point, LLC; Stone Mountain, LLC; Corney
26 Investors, LLC; and CFalls Investment, LLC
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